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Supreme Court, U.S.
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No. 85-1519

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THOMAS HOOPER, Et Al., - - - Petitioners,

versus

WILLIAM DONTA, JR., - - - Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

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BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Respondent preserved for appellate review his objection to the submission to the jury of the issue of Petitioners' entitlement to the defense of good faith immunity?

II. Whether this Court's modification of the plain view doctrine in 1983 has any effect on the determination that Petitioners were not entitled to the defense of good faith immunity where they violated the clearly stated parameters of the plain view doctrine in 1979?

III. Whether, under *Harlow* v. *Fitzgerald,* the test to be applied with regard to the entitlement to the defense of good faith immunity is objective or subjective?

PARTIES

Respondent accepts Petitioners' identification of the parties.

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WILLIAM DONTA, JR., - - - *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

Respondent accepts Petitioners' statement of the decisions below.

JURISDICTION

Respondent admits that this Court has jurisdiction to entertain this Petition pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the Petitioners' statement of the federal constitutional and statutory provisions involved.

OPINIONS BELOW

Respondent accepts the Petitioners' statement of the opinions relevant to the determination of the writ applied for.

COUNTERSTATEMENT OF THE CASE

Respondent accepts the Petitioners' statement of the case, for purposes of this Petition, with the addition of the following information. Prior to the submission of this case to the jury, the trial court heard extensive arguments from counsel of all issues. The trial court indicated that with respect to the seizure of Respondent's rifles, *U. S.* v *Gray,* 484 F. 2d 352, was controlling and that the seizure was unlawful. The Court further indicated:

> ". . . I think good faith of the defense is still applicable in all of these matters, but as far as the constitutional determinations, it seems like a pretty tight case . . ." Tr. Vol. IV, p. 566.

On the issue of the arrest of the Respondent, the trial judge held:

> "Therefore, I just simply cannot find any kind of a basis to say that the second arrest was lawful. I understand that leaves a lot of other questions, concerning good faith immunity and damages and all of that, if any . . ." Tr. Vol. IV, p. 588.

Counsel for Respondent then argued to the Court that:

> ". . . I would point out to the Court its my understanding that is an affirmative defense which

> the Defendant has the obligation of proving and if I understand it, under the *Harlow* v. *Fitzgerald* case, 457 U. S. 800, (1982), that is no longer a subjective test. That is now an objective case, and the claim for the defense is defeated, and they knew or reasonably should have known that the actions would violate the well defined constitutional [rights] of the Defendant.
>
> In as much as the requirements are a clear matter of law . . . I feel they've failed to meet their burden as a matter of law and I feel this would apply to the second arrest and would ask for a directed verdict as to liability." Tr. Vol. IV, pp. 591-592.

The Court replied and held that:

> "In a word, I'm sure there are some cases somewhere that the objective prongs of Harlow cannot be satisfied from the state of evidence as a matter of law. I don't think this is one of them." Tr. Vol. IV, p. 592.

Thereafter, the Court having ruled, Respondent did not additionally object to the Court submitting to the jury the issue of good faith immunity, for the simple reason that the Court had ruled on Respondent's objections.

Moreover, the Respondent reasserted his objections to the submission of the good faith issue to the jury pursuant to a timely filed motion for Judgment Notwithstanding the Verdict and For New Trial pursuant to F.R.C.P. 50(b) and 59(a), which was denied by the trial court.

ARGUMENT

I. Respondent Made a Proper and Timely Objection to the Submission of the Issue of Good Faith Immunity to the Jury.

Counsel for Respondent clearly indicated to the Court in the colloquy set forth in the Counterstatement of the Case his objection to the Court submitting the issue of the Petitioners' good faith immunity to the jury. Counsel argued that under *Harlow* v. *Fitzgerald,* 457 U. S. 800, 102 S. Ct. 916, 39 L. Ed. 110, (U. S. 1982) the test for determining the availability of the defense of good faith immunity was an objective test to be determined by the trial court as a matter of law. The learned trial judge disagreed and submitted the matter to the jury under a subjective test instruction.

In Vol. 5A *Moore's Federal Practice,* §51.04, it *is* noted that a formal objection to instructions is not necessary to preserve the issue on appeal under F.R.C.P. 51 where the objection would have been a mere formality under the circumstances.

Respondent had clearly made known to the trial judge his view that the issue of good faith immunity should be decided as a matter of law without the intervention of a jury and the court had clearly made known its opinion that Respondent's view was erroneous. No further objection was required. Any additional objection would have been a mere formality since the court had clearly been made aware of Respondent's objections and overruled them.

Nonetheless, Respondent reasserted the matter in his motion for judgment notwithstanding the verdict. This motion was denied by the trial court, on the merits.

Clearly, the purpose of F.R.C.P. 51 was served by the Respondent's twice bringing to the trial court's attention the alleged error. The Sixth Circuit Court of Appeals recognized this fact and refused to hold that the objection was not preserved. This Court should do the same by denying Petitioners' request for a writ of certiorari.

II. *Texas* v. *Brown* is Irrelevant to the Decision of This Case by the Court of Appeals.

Respondent cannot improve on the plain, direct, and concise manner in which the court below dealt with Petitioners' argument that *Texas* v. *Brown,* 460 U. S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (U. S. 1983), mandates a change in the result of this case:

> "The scope of the plain view doctrine was clearly established at the time the defendants seized Donta's guns. Under *Cooledge* v. *New Hamphire,* 403 U. S. 443, 466 (1971), when the police seized evidence under the plain view doctrine, the incriminating nature of the evidence must be "immediately apparent" to the officers. In *Texas* v. *Brown,* 103 S. Ct. 1535 (1983), the Court modified the operative language of the plain view doctrine, but *Texas* v. *Brown* is irrelevant to the present case. Under *Harlow* this Court looks to the law as it existed at the time of the official behavior for which the defendants seek immunity. *Harlow,* 457 U. S. at 818." *Donta* v. *Hooper,* Page A7, Appendix to Petitioner's brief.

The Petitioners violated the clearly defined rights of the Respondent at the time of the search and seizure. Subsequent changes in the law do not entitle them to claim good faith immunity for actions they constructively knew to be improper at the time.

III. The Decision of the Court of Appeals was a Correct Implementation of the Rule of *Harlow* v. *Fitzgerald*.

Petitioners' argument is essentially a plea for a return to the subjective test for determination of the availability of good faith immunity. Under *Harlow,* where the law is clearly established, it is reasonable that a police officer should be held accountable for knowledge of the law and the defense of good faith immunity made unavailable to him. To hold otherwise, is to reopen this area of the law to all of the problems created by the subjective test leading to its rejection by this Court in *Harlow.*

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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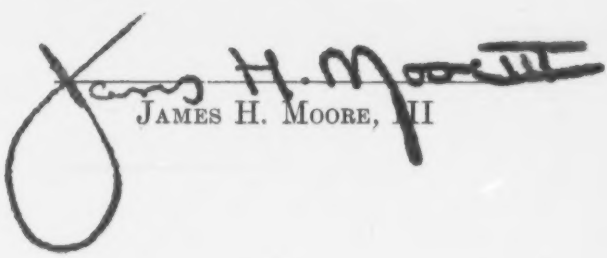
CERTIFICATE OF SERVICE

I, James H. Moore, III, counsel of record for the Respondent, do hereby certify that this Brief has been served upon all parties required to be served pursuant to Rule 28 of the Revised Rules of the Supreme Court of the United States by depositing three copies of the same in the United States Post Office, first class postage prepaid, addressed to counsel of record as follows: Hon. Anthony J. Celebrezze, Jr., Attorney General of Ohio, Hon. Gene W. Hollicker, Assistant Attorney General, State Office Tower, 30 East Broad Street, 26th Floor, Columbus, Ohio 43266, Counsel of Record for Petitioner Hooper; Hon. Mary Jane McFadden, McFadden and Sponseller, 2727 Tuller Parkway, Dublin, Ohio 43017, Counsel of Record for Petitioners Hunter, Brooks, Rose, Altherr, Morgan, Mannering and Robinson, this the 4th day of April, 1986.



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